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No. 03-1347

In the Supreme Court of the United States

JACQUELINE ORLOFF,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's principal argument against review is the assertion that Congress' definition of "common carrier" and the specific requirements of common carriers set forth in 47 U.S.C. § 332(c)(1) and 47 U.S.C. § 202 were repealed by implication when the tariffing requirements of an entirely separate section, 47 U.S.C. § 203, were repealed. Resp. Opp. Brief 7. This is not correct.

A tariff is simply a price list filed by a carrier with the government. It is a tool intended to help prevent discrimination by common carriers. Respondent confuses the requirements of common carriage and non-discrimination with the enforcement tool of the filed tariff. Tariffs are only one means to achieve the goal of preventing discrimination. Eliminating law enforcement does not eliminate the substantive law or the right to a remedy. Another means to the same end is the complaint process – like the complaint brought by Petitioner. Indeed, Petitioner's discrimination claim has nothing to do with enforcement through the filed rate doctrine – a topic that consumes the primary part of Respondent's argument. Resp. Opp. Brief 7-8.

More critically, Respondent ignores Congress' distinction between common carriers and private carriers. Respondent, recognizing that the Opinion below conflicts with this Court's decision in *FCC v. Midwest Video*, 440 U.S. 689, 701 (1979), attempts to distinguish *Midwest Video* on the basis of the tariffing requirement. The elimination of tariffs under 47 U.S.C. § 203 did not authorize common carriers to violate 47 U.S.C. § 332(c)(1) or 47 U.S.C. § 202. Section 202, which has not been repealed, still requires the FCC to undertake the three-step burden-shifting analysis to determine whether there is any individual reason that a

common carrier discriminated against a particular person, not just a group of persons.

Respondent has no answer for the fact that Congress intelligently distinguished between common carriers and private carriers. Nor does Respondent disagree that the Opinion below impermissibly eliminates Congress' distinction between common carrier and private carriers. The Opinion below will affect Congress' use of the term "common carrier" in 410 separate sections of the United State Code and its application to more than a dozen industries ranging from airlines to pipelines.

I. CONGRESS INTELLIGENTLY DISTINGUISHED BETWEEN PRIVATE CARRIERS AND COMMON CARRIERS.

There is only one difference between common carriers and private carriers: a common carrier does not make individualized decisions as to whether and on what terms to deal.[1] In contrast, a private carrier does enter into

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[1] *Midwest Video, supra*; *see also, MediaOne Group, Inc. v. County of Henrico, Va.*, 97 F. Supp. 2d 712, 716 (E.D. Va. 2000), *aff'd*, 257 F.3d 356 (4th Cir. 2001)(noting that repealed cable access requirements had previously made cable stations common carriers because they deprived "the firm of the right held by a private carrier to make individualized decisions, in particular cases, whether and on what terms to deal"); *Florida Power & Light Co. v. F.E.R.C.*, 660 F.2d 668, 674 (5th Cir. 1981), *cert. denied sub nom*, 459 U.S. 1156 (1983) (holding that a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases as to whether and on what terms to serve); and *Howard v. America Online, Inc.*, 208 F.3d 741, 752 (9th Cir.), *cert. denied*, 531 U.S. 828 (2000) (dismissing RICO claims and noting that "a common carrier does not make individualized decisions, in particular cases, whether and on what terms to deal").

individualized deals.[2] Individualized deal-making is the sole distinction between common carriage and private carriage.[3]

Congress required that Verizon Wireless act as a common carrier. 47 U.S.C. § 332(c)(1). The Opinion below holds that Verizon Wireless may make individualized decisions as to whether and on what terms to deal. This is private carriage. The Opinion below impermissibly violates Congress' statutory requirement of common carriage.

In an attempt to minimize the significance of Congress' common carrier requirement, Respondent claims that "common carrier" is merely a common law term. In fact, the words "common carrier" were required by Congress, not the courts. The term "common carrier" is so familiar to Congress that it is used in 410 separate sections of the United States Code.[4] "Common Carrier" is also used in 2,821

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[2] *See, e.g.*, 13 Am. Jur. 2d, Carriers, §17; *In re Transcon Lines*, 89 F.3d 559 (9th Cir. 1996); *Sawyer Transport Extension, Inc. v. Carleton Flat Glass*, 131 M.C.C. 539, 542 (ICC 1979).

[3] *In the Matter of Federal-State Joint Board on Universal Service*, 1999 WL 76932, 14 F.C.C.R. 3040 ¶7 (February 18, 1999)("holding oneself out to serve indiscriminately appears to be ***an essential element, if one is to draw a coherent line between common and private carriers***. In contrast, a carrier that ***serves clients on an individualized basis***, determines ***whether and on what terms to serve each client***, and is under no regulatory compulsion to serve all indifferently, is a private carrier for that particular service")(Emphasis added); *In the Matter of Independent Data Communications Manufacturers Association, Inc.*, 1995 WL 613619, 10 F.C.C.R. 13, 717, ¶50 (October 18, 1995) ("Common carrier status attaches to carriers undertaking to provide a service indifferently to all potential customers. In contrast, private carriage is characterized by a carrier choosing its clients on an individual basis and determining in each particular case whether and on what terms to serve"); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp.2d 1081, 1095 (N.D. Cal. 2001) ("a common carrier does not make individualized decisions, in particular cases, whether and on what terms to deal").

[4] *See*, http: www.westlaw.com, "U.S.C." database.

sections of the Code of Federal Regulations.[5] The term "common carrier" cannot be turned into "private carrier without violating" Congress' clear language throughout the United States Code.[6]

II. CONGRESS' STATUTORY REQUIREMENT OF COMMON CARRIAGE HAS NOT BEEN REPEALED BY IMPLICATION.

Respondent spends the first seven pages of its Brief arguing that technological advances can change the meaning of "common carrier" in 47 U.S.C. § 332 and the accepted analysis for non-discrimination under 47 U.S.C. § 202. Resp. Opp. Brief at 1-7. Ultimately, Respondent argues that forbearance under § 203 also altered the substantive obligations under § 332 and § 202.

Respondent's argument is an open admission that the Opinion below creates new law that is in conflict with existing law. Indeed, Respondent's argument violates the "cardinal rule . . . that repeals by implication are not favored." *Cook County v. United States*, 538 U.S. 119, 132 (2004) quoting *Posadas v. National City Bank,* 296 U.S. 497 (1936). If there is to be a change in § 332 or § 202 it must come from Congress. If there is to be forbearance from § 332 or § 202, the FCC must follow the rules for forbearance

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[5] *See*, http: www.westlaw.com, "C.F.R." database.

[6] Respondent concedes that the Opinion below "rejected Petitioner's contention that, as a common carrier, Verizon Wireless necessarily is precluded from mak[ing] individualized decisions, in particular cases, whether and on what terms to deal." Resp. Brief Opp. 5. Respondent's argument concedes that the Opinion below's holding is that "a common carrier can be a private carrier." This holding is logically impossible. The Opinion's self-contradictory holding conflicts with the decision of this Court and the decisions of the Fourth, Fifth, and Ninth Cicuits, as well as lower courts in the Seventh Circuit.

– which it has not done. The FCC cannot alter *sub silentio* or repeal by implication the rules set forth by Congress.

Recognizing that the Opinion below directly conflicts with *Midwest Video* and its progeny, Respondent attempts to distinguish this Court's binding precedent on the grounds that it allegedly applies only in the context of a tariffed environment.

Tariffs were created as one of several mechanisms to enforce the substantive non-discrimination requirements for common carriers. The purpose of § 202, and its predecessor the Interstate Commerce Act, was to prevent discrimination. One way Congress chose to prevent discrimination was to require carriers to publicly file all price lists (i.e. tariffs) with the government. A second mechanism was to bring a complaint pursuant to 47 U.S.C. § 208.

The FCC itself specifically denied any "repeal by implication" when it decided to detariff. The FCC said "when we decided to forbear from applying tariff requirements to CMRS, we relied on sections 201 and 202 and the section 208 complaint process as important safeguards to protect consumers. . . ." *In the Matter of Personal Communications Industry Association's Petition for forbearance for Broadband Personal Communications Services*, 13 F.C.C.R. 16,857, ¶16 (July 2, 1998).

The fact that one means of enforcement (tariffing) has been repealed, does not repeal the substantive obligations to act as a common carrier and to follow § 202. Detariffing has nothing to do with *Midwest Video's* definition of common carriers or Verizon Wireless' obligation of common carriage. This point is made clear by the fact that common carriers have continued to exist in a detariffed environment.

Respondent's attempt to distinguish *Midwest Video* is a recognition that the Opinion below conflicts with this Court's binding precedent. Even without a tariff, Verizon Wireless must still be a common carrier. 47 U.S.C. § 332(c)(1).

III. THE ORLOFF COURT FAILED TO CONDUCT THE REQUIRED ANALYSIS OF ORLOFF AS A "PARTICULAR PERSON."

Respondent argues that the FCC has great leeway in determining whether discrimination is reasonable. Resp. Opp. Brief 8-9. The FCC, however, cannot misapply the well-settled three-part test for discrimination based upon a misreading of the law a repeal by implication. *MCI Telecommunication Corp. v. v. AT&T*, 512 U.S. 218 (1994) (refusing F.C.C. discretion to modify statutory requirements where Congress had clearly spoken.)

Orloff brought her claim as an individual. Both the FCC and Orloff Court held that § 202 only applied if she had brought her claim as part of a group. They therefore refused to analyze whether Verizon Wireless had a reason for discriminating against Orloff as a particular person.

Section 202 specifically applies to "any particular person, class of persons, or locality." The Opinion below directly mis-applied the specific language of § 202.

IV. THE ORLOFF DECISION WILL CREATE UNCERTAINTY BECAUSE COURTS HAVE UNANIMOUSLY UNDERSTOOD AND SUPPORTED CONGRESS' DISTINCTION BETWEEN COMMON CARRIERS AND PRIVATE CARRIERS.

Although Respondent attempts to distinguish its conflict with *Midwest Video*, Respondent has no answer for

its conflicts with Courts from the First, Fourth, Fifth, Seventh and Ninth Circuits. [7]

Until the Opinion below, the term "common carrier" meant only one thing: a carrier could not make individualized decisions as to whether and on what terms to deal. This is the only characteristic that distinguishes a common carrier from a private carrier. The Opinion below holds that a common carrier is now permitted to make individualized decisions. Thus, the sole distinguishing characteristic has been eliminated.

The result of the Orloff Court's attempt to distinguish well-settled precedent will be uncertainty. The now undefined term is used in 410 sections of the Federal Code

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[7] *Howard v. America Online, Inc.*, 208 F.3d 741, 752 (9th Cir.), *cert. denied*, 531 U.S. 828 (2000) (dismissing RICO claims and noting that "a common carrier does not make individualized decisions, in particular cases, whether and on what terms to deal"); *Florida Power & Light Co. v. F.E.R.C.*, 660 F.2d 668, 674 (5th Cir. 1981), *cert. denied sub nom*, 459 U.S. 1156 (1983) (holding that a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases as to whether and on what terms to serve); *Trailways of New England v. Cab*, 412 F.2d 296, 931 (1st Cir. 1969) ("the right to be treated fairly and nondiscriminatorily by a common carrier . . . is one derived from the common law of common carriers"); *Semon v. Royal Indemnity Co.*, 279 F.2d 737 (5th Cir. 1960); *MediaOne Group, Inc. v. County of Henrico, Va.*, 97 F. Supp. 2d 712, 716 (E.D. Va. 2000), *aff'd*, 257 F.3d 356 (4th Cir. 2001)(noting that repealed cable access requirements had previously made cable stations common carriers because they deprived "the firm of the right held by a private carrier to make individualized decisions, in particular cases, whether and on what terms to deal"); *That's Entertainment of Illinois, Inc. v. Centel Videopath, Inc.*, 1993 WL 13011588 (N.D. Ill. Dec. 9, 1993) (noting that in determining whether cable provider was a common carrier, the "allegations in the complaint do not reveal whether Centel makes individualized decisions in particular cases, whether and on what terms to deal with public customers, or whether it did so with plaintiffs").

and 2,281 sections of the Code of Federal Regulations. The term common carrier has also been applied to, *inter alia* :

Airlines -- 49 USCA § 40102(23) & (25) & (27): defining foreign, interstate and intrastate (with certain requirements) air transportation as common carriers. *Las Vegas Hacienda, Inc. v. C.A.B.*, 298 F.2d 430 (C.A. 9, 1962) (requiring all those who compete in the commercial market in the business of offering air transportation to the public to act as common carriers;

Railroads -- 49 USCA § 10102: defining a rail carrier as a common carrier. *Omaha & C.B. St. Ry. Co. v. Interstate Commerce Commission*, 33 S. Ct. 890 (1913) (requiring all those engaged in transportation of passengers or property by railroad to act as common carriers);

Shipping -- 46 App. USCA § 1702(6): defining a common carrier for water transportation. *Transpacific Westbound Rate Agreement v. Federal Maritime Com'n*, 951 F.2d 950 (C.A. 9, 1991) (requiring all those who load or discharge passenger or cargo at a U.S. port to act as common carrier);

Pipelines -- 30 USCA § 185(r): defining pipelines as common carriers. *Producers' Transportation Co. v. Railroad Commission of State of California*, 251 U.S. 228 (1920) (requiring that all petroleum pipelines voluntarily devoted to public use act as common carriers);

Gas Companies -- *Montana-Dakota Utilities Co. v. Federal Power Commission*, 169 F.2d 392 (C.A. 8, 1948) (requiring that gas companies constructing a pipeline across government rights of way act as common carriers);

Long Distance Phone Companies -- 47 USCA § 153: requiring all those engaged in interstate or foreign communication by wire or radio to act as common carriers;

Telephone Operator Services -- 47 USCA § 226: requiring all providers of operator services to act as common carriers;

Pay-Per-Call Services -- 47 USCA § 228: requiring those engaged as interstate pay-per-call services to act as common carriers;

Computer-Telephone Network Services -- 47 USCA § 153: requiring all those engaged in interstate or foreign communication by wire or radio to act as common carriers;

Telegraph Services Equipment Offerings -- 47 USCA § 153: requiring all those engaged in interstate or foreign communication by wire or radio to act as common carriers;

Buses -- *National Bus Traffic Ass'n, Inc. v. I.C.C.*, 613 F.2d 881 (C.A.D.C., 1979) (treating buses in National Bus Traffic Association, Inc. as common carriers); and

Taxicabs -- *Thompson v. Amalgamated Cas. Ins. Co.*, 207 F.2d 214 (C.A.D.C. 1953) (treating taxicabs as common carriers, able to be regulated by Congress).

In each of these industries, the businesses must, as common carriers, treat all similarly-situated customers in the same manner. As the FCC found here, in each of the above situations, there is competition. Now, pursuant to the decision of the District of Columbia Circuit in *Orloff*, it will logically follow that despite Congress and the Court's labeling them as "common carriers" the companies doing business previously as "common carriers" in these industries

may now disregard that label and act as "private carriers." The Opinion below is in direct conflict with well-settled precedent and statutory definitions and will have an impact far beyond the current case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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